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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 646

ANDREW TERRASI,

Petitioner,

v.

SOUTH ATLANTIC LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, plaintiff-appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York (Bondy, D. J.), sitting at law, upon the motion to set aside the verdict and grant a new trial is unreported and is printed in the separate appendix below infra (p. 13a, R. 428).

The opinion of the United States Court of Appeals for the Second Circuit (Clark, Medina and Lumbard, C. JJ.,

opinion by Clark, Ch. J.) is reported in 226 F. 2d 823 and is printed herein at page 13.

The conflicting opinion of the New York State Court of Appeals, *Williams* v. *Alexander,* reported in 309 N. Y. 283, 129 N. E. 417, decided October 13, 1955, is printed herein at page 18.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on October 31, 1955.

Jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1), 2101(e) and 2106.

Question Presented

Whether a plaintiff's alleged statement, not germane to diagnosis or treatment, entered in a ship doctor's purported journal, where the ship's doctor is an employee of the defendant and is alleged to be an active tort feasor, is admissible in evidence under 28 U. S. C. Sec. 1732a as a memorandum or record made in the regular course of business.

Statutes Involved

* "28 U.S.C.A. 1732(a) In any court of the United States and in any court established by Act of Congress, *any writing or record, whether in the form of an entry in a book or*

---

* *New York Civil Practice Act,* Sec. 374-a—The pertinent language of this Act which is identical with the language of the Federal Act is italicized for comparative purposes and the convenience of the Court.

Although not material variations, where the wording differs the Federal language is shown in roman type, while the New York State language is contrasted by italics.

Matter in brackets are variations of the New York statute.

otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such [*in proof of said*] *act, transaction, occurrence, or event, if* [*the Trial Judge shall find that*] *it was made in* [*the*] *regular course of any business, and* if [*that*] *it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter.*

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances [*they*] *shall not affect its admissibility.*

The term business, as used in this section includes [*shall include*] *business, profession, occupation, and calling of every kind.*"

Statement of the Case

Plaintiff asserted two causes of action (A. 2a-5a, R. 393-396) against the defendant, the first based upon its negligence and violation of its duty as a common carrier resulting in injury to the plaintiff on the high seas and the second in negligence for abusive treatment by the ship's doctor following his injury, based upon the following facts:

In the early morning hours of May 21, 1950, while on a trip as a third-class passenger from New York to Palermo, Sicily, and while ascending a staircase on the ship from C deck, where his cabin was, to the toilet facilities on B deck, he was suddenly struck from behind upon his head by an unidentified assailant and rendered unconscious. He asserted negligence on the part of the ship in failing to furnish watchmen to protect the passengers from assault during the night hours. Defendant denied that it was negligent and contended that plaintiff had been seized with

a fit of dizziness while ascending the staircase and fell, striking his head.

In his second cause of action plaintiff contended that some days later, when the ship's doctor was removing the stitches from his head, the ship's doctor inquired as to how he had met with his injury and when the plaintiff related the above facts the ship's doctor threatened to place him in a strait jacket for the balance of the trip if he repeated those facts about the ship.

The issues came on for presentment to a jury and defendant, during the course of the trial, offered its Exhibit G (annexed to the appendix below) into evidence as proof of its contention, to which plaintiff objected upon the ground that the same was incompetent and self-serving.

Plaintiff denied having made any such statement as contained in the exhibit.

The Trial Court reserved decision and eventually both sides rested. After settling requests to charge, the Court suddenly and upon its own initiative announced that it was admitting Defendant's Exhibit G into evidence (R. 339a) over plaintiff's objection as proof of "whatever is in it" (R. 350), giving plaintiff an exception.

A stipulated translation of Exhibit G is as follows:

> "At 6.15, while returning to the cabin on Deck C (after having been in the toilet on Deck B) was caught by sudden dizziness and fell on the stairway, striking his head on steps.
>
> Lacerated, contused wound or cut, six centimeters at the occipital region, deep to the bone. Fairly accentuated or fairly pronounced shock."

Within twenty-five minutes after retiring the jury sent in a note requesting "a translation of the medical log report please" (R. 388) and Juror No. 2, speaking for the forelady and jury, stated to the Court that what they would like to know, or read in English, is

> "the doctor's report or his meaning in English of what he found *from* plaintiff when he arrived at the hospital (ship's surgery)". (Emphasis supplied.)

Some eight hours later (R. 392) the jury returned with a verdict for the defendant upon both causes of action. Motions to set aside the verdict and for a new trial upon the grounds that the admission of Exhibit G into evidence was prejudicial to the plaintiff were denied. There is no evidence in the record, other than Exhibit G, to support the contention that plaintiff had had a dizzy spell and fallen.

The Court of Appeals for the Second Circuit affirmed the District Court holding that under 28 U. S. C. 1732a the complete exhibit was properly admissible.

Reasons for Allowance of the Writ

1. The Court of Appeals for the Second Circuit has rendered a decision herein in direct conflict with this Court's decision in *Palmer* v. *Hoffman*, 318 U. S. 109, 144 A. L. R. 719.

2. The Court of Appeals for the Second Circuit has rendered a decision herein in direct conflict with a decision of the Court of Appeals for the State of New York on the precise point in *Williams* v. *Alexander*, 309 N. Y. 283, 129 N. E. 2d 417, decided a few weeks earlier, on October 13, 1955.

3. The Court of Appeals for the Second Circuit has rendered a decision herein in direct conflict with the decisions of other states having identical or similar statutes, such as Maryland, Michigan, Ohio, Pennsylvania, Connecticut, Delaware, Minnesota, etc.

4. It is of national importance that the precise point be reviewed and settled by this Court so that there may be uniform application of the law among the Federal courts, and between them and those jurisdictions having identical or similar statutes, otherwise by the mere expedient of

transfer of venue from a State court, where diversity of citizenship and concurrent jurisdiction exists, to a Federal court (such as in the Second Circuit) a defendant may procure a prejudicial advantage over the plaintiff and thereby defeat a valid claim.

The vessel involved was the *Italia*, flying a Panamanian flag at the time, with an Italian crew, and the ship's doctor testified that in his capacity he was considered as "a member of the crew" of the ship (R. 274).

The sole qualification to offering the exhibit by the defendant was that while plaintiff was in the state of "fairly accentuated or fairly pronounced shock" the ship's doctor testified that he was cleansing the wound and suturing the same and at the same time was making the entry in the exhibit in the presence of his male nurse (R. 152), which exhibit is from a book which he testified he kept

> "in the regular course of his (your) practice of medicine during his (your) regular course of business (here) on board the ship" (R. 154).

The objection to competency below and in the Court of Appeals (R. 163) was grounded on the fact that the document itself was not established as qualifying within the business records statute and that the alleged hearsay narrative contained therein was not germane to medical diagnosis or treatment but in fact was a self-serving declaration made by an active tort feasor for whom the defendant is responsible.

That it was never qualified under the statute, if otherwise admissible, is obvious, for nowhere in the record did defendant show or establish that the document was made in the regular course of the steamship business and that it was the regular course of the steamship business or the entrant's employer to require that he interrogate each patient as to the manner in which he received his injury or illness and to record the same. Indeed, upon the face

of the exhibit there are no entries of such nature with respect to other patients.

Before its admission by the Court below, by its own direct examination of its male nurse witness, in whose presence the ship's doctor testified he interrogated the plaintiff, the defendant established that no such interrogation took place (R. 327, 328):

CASSOLINO, *direct.*

"Q. Did you hear any conversation between the man and the doctor or the man and Mr. Belli? A. No.

Q. Were you in the surgery all the while that this man (plaintiff) was here? A. Yes.

CASSOLINO, *cross.*

A. The doctor and nurse who was here were cleaning around the wound, cutting away the hair to get ready to put in the stitches.

Q. Was any conversation taking place at the time? A. No.

Q. Were you here all the time that this man was in here being treated? A. Yes" (R. 331, 332).

And, as testified by the ship's doctor on further cross-examination (R. 284):

"Q. In other words, now, you are able to tell us that there was no record for Terrasi because you actually looked for a record at the time the steamship company's investigator came aboard ship to question you about it. Is that right? A. There was no record, so I couldn't say to the company that there was a record when there was no record."

The ship's doctor had also testified that Exhibit G was in his handwriting and a casual examination reveals that this document, which was before the Trial Judge, as well as the above admissions, before the Court admitted it into evidence, is actually a fraudulent document. Between the

dates "20" and "22", under the heading "N. Ordine", the ship's doctor endeavored to insert an entry to correspond with the date "21" in order to maintain a sequence of dates so that it would appear to have been made in regular order but apparently abandoned the attempt because of lack of space between those two dates and then, "contemporaneously" with suturing the plaintiff on May 21st, made his entry beneath the date "May 22" and dated the same "May 21."

If the alleged statement made by the plaintiff to the ship's doctor would ordinarily be admissible, in this instance the evidence before the Court clearly took it out of the statute and it should never have been submitted to the jury (*Palmer* v. *Hoffman*, 318 U. S. 109), for, as Mr. Justice Douglas very aptly put it:

> "The conduct of business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act.
>
> If it did, then any law office in the land could follow the same course, since business as defined in the Act includes professions. We would then have a real perversion of a rule designed to facilitate admission of *records which experience has shown to be quite trustworthy.*
>
> * * * * * *
>
> Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met." (Emphasis supplied.)

Here the Court admitted it as proof of what it contained and the jury accepted it as such, for, without it, it could not have returned a verdict for the defendant, because

there is no other evidence upon the record to support the defendant's contention.

In *Williams* v. *Alexander,* 309 N. Y. 283, 129 N. E. 417 (Oct. 13, 1955), the hospital record involved was from an independent hospital not involved in the litigation, whereas in the case at bar the exhibit was made by an active tort feasor, an employee of the defendant.

The *Williams* case came under Section 374-a of the New York Civil Practice Act, the business records Act of New York, which is identical and verbatim with the Federal Act, and there the hospital had upon its records that the patient had stated to the physician that

> "he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car (standstill) to run into him."

The Trial Court admitted the complete record over plaintiff's objections and a verdict in favor of the defendant was rendered, which was affirmed by a divided Appellate Division. In reversing and remanding for a new trial, upon the ground that the admission into evidence of that alleged statement contained in the hospital record was erroneously admitted, the New York Court of Appeals cited this Court's *Palmer* v. *Hoffman* decision in support, as well as a myriad of decisions of other states having identical or similar business records Acts, stating that:

> "The particulars may be a natural subject of the doctor's curiosity, but neither the inquiry nor the response properly belongs in a record designed to reflect the regular course of the hospital's business. (Citations.)"

The Court further stated, citing from authorities throughout the nation, that the typical and almost universal holding with respect to such entries is,

> "it was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not

> to record a statement describing the cause of the accident in which plaintiff's injuries were sustained":

and that,

> "Consequently, the only memoranda that may be regarded as within the section's compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise 'helpful' to an understanding of the medical or surgical aspects of (the particular patient's) hospitalization."

In the Third Circuit, *Spellman* v. *American Barge Line Co., Inc.*, 76 Fed. Supp. 1, the District Court admitted into evidence, over plaintiff's objections, a hospital record kept by disinterested persons but which contained alleged declarations made by the plaintiff. The jury found for the defendant and, upon motion to set aside and for a new trial, the District Court recognized its error and granted plaintiff a new trial upon the ground that the alleged declarations in the hospital record

> "were not made as a record, memorandum or record, of any act, transaction, occurrence or event"

within the meaning of the Federal Act.

In the language of Mr. Justice Douglas in the *Palmer* case, the alleged record herein was not for the systematic conduct of the defendant's business as a steamship business

> "Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in Court, not in the business. Their primary utility is in litigating, not steamboating (railroading)" (*Palmer v. Hoffman*, supra).

If the judgment of the Court of Appeals for the Second Circuit is permitted to stand, it means that henceforth every passenger of a common carrier, indeed, every seaman and railroad employee, who sustains an injury due to the

negligence of the carrier can quite easily be defeated in a valid cause of action by the simple expedient of the defendant placing into evidence self-serving declarations, made in its behalf by its employee-tort feasor, and such documents would be accorded the same dignity and high degree of trustworthiness as is accorded to customary business records, entries in family Bibles, log books, etc.

Insurance company investigators, upon discovering the absence of any records (p. 7 herein), could very easily create "trustworthy" records by simply instructing the responsible tort feasor-employee to insert an appropriate entry favorable to the carrier, with the result that the issue for the jury would be whether to believe any plaintiff as against such "trustworthy" documentary evidence. No longer would a defendant have to produce competent fact witnesses, but it could confidently sit back and rely upon the overwhelming weight of such documents as against the spoken word of the injured party as occurred in the instant case. Indeed, even with eyewitnesses a plaintiff would have an extremely doubtful hurdle.

This Court has never had occasion to consider the precise point raised herein and, as appears in the *Williams* decision, that case was the first and only occasion for the New York State Court of Appeals to consider the point. The conflict between the Court of Appeals for the Second Circuit and the New York State Court of Appeals, as well as those other jurisdictions cited by the New York State Court of Appeals, is of national importance and should be resolved by this Court so that all of the Federal courts and the courts of those states having Business Records Acts identical or similar to the Federal Business Records Act will have uniformity in applying the law under such Acts.

CONCLUSION

For all of the above reasons a writ of certiorari as prayed for should be granted.

Respectfully submitted,

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Dated, New York, N. Y.,
January 26, 1956.

DARK PAGE

OPINION APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(226 F. 2d 823)

ANDREW TERRASI, plaintiff-appellant, v. SOUTH ATLANTIC LINES, INC., defendant-appellee.

Decided October 31, 1955.

Before CLARK, Chief Judge, and MEDINA and LUMBARD, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, William Bondy, Judge.

Plaintiff appeals from a verdict and judgment for the defendant in his action for damages for personal injuries sustained on board the defendant's SS. Italia. Affirmed.

HARRY D. GRAHAM for plaintiff-appellant.

LOUIS J. GUSMANO (KIRLIN, CAMPBELL & KEATING on the brief) for defendant-appellee.

CLARK, Chief Judge—This is an appeal by the plaintiff from a verdict and judgment for the defendant in his action for damages for personal injuries alleged to have been sustained through the negligence of defendant while he was a passenger at sea on the defendant's SS. Italia. At the outset we must consider defendant's motion to dismiss the appeal as not timely. When the defendant's verdict was rendered on January 20, 1955, plaintiff at once made an oral motion for a new trial, which the court as promptly denied. The next day, January 21, the plaintiff filed a formal written motion for reargument of his motion for a new trial, setting forth various grounds upon which he contended that he was entitled to such trial; and this the defendant's counsel answered by affidavit on January 25. Meanwhile a formal judgment for the defendant was entered by the clerk on January 21. Plaintiff's motion was denied by the court on February 28 in a brief memorandum indorsed upon it, in which it is described as the "motion to set aside the verdict and for a new trial," and which discloses that the court considered it on the merits. Plaintiff's appeal followed on March 2—too late if his time runs from the date of the formal judgment, but in time if it runs from the denial of the motion.

Defendant asserts that a motion for a reargument is not within the several motions specified in F. R. 73(a) as suspending and thus extending the time within which an appeal can be taken. But this is too literal a reading of the language of the rule. A motion for reargument of a motion for a new trial is of course nothing but a motion for rehearing thereof, and thus in essence is itself but an application for a new trial under F. R. 59(a), which explicitly includes all applications for rehearing as previously understood. Thus the advisory committee's note to this rule shows that it includes the former "petition for rehearing" of Equity Rule 69. As pointed out in Slater v. Peyser (D. C. Cir., 200 F. 2d, 360, 361): "Under Rule 59(a), Fed. Rules Civ. Proc., 28 U. S. C. A., a motion for rehearing is

equivalent to a motion for a new trial." The very reasons which led the advisory committee to recommend the amended Rule 73(a) in the interest of clarity and to avoid confusion as to the proper time for appeal apply equally to this motion. Of course it must be timely made within ten days, as specified in F. R. 59(b), and thus in any event cannot delay the proceedings unduly. The appeal here properly taken when the motion was denied is therefore timely (see Anderson v. Continental SS. Co., 2 Cir., 218 F. 2d, 84; Mosier v. Federal Reserve Bank of New York, 2 Cir., 132 F., 2d, 710, and the cases cited in the annotation 10 A. L. R., 2d, 1075, at 1079, 1080). Cases such as Marten v. Hess (6 Cir., 176 F., 2d, 834), Dena Products Co. v. United Brick & Clay Workers of America (6 Cir., 195 F., 2d, 612, certiorari denied 344 U. S., 822) and Randolph v. Randolph (D. C. Cir., 198 F., 2d, 956) are distinguishable as referring to motions either not timely made or otherwise not the equivalent of the one filed here. See Morley v. United States (6 Cir., 207 F., 2d, 654), pointing out the lack of timeliness of the motion for rehearing there.

The plaintiff's appeal is based on the contention that in the early morning of May 21, 1950, while on a trip as a third-class passenger from New York to Palermo, Sicily, and while ascending a staircase on the ship from C deck, where his cabin was, to the toilet facilities on B deck, he was suddenly struck from behind upon his head by an unidentified assailant and rendered unconscious. On these alleged facts he asserted negligence on the part of the ship in failing to furnish watchmen to protect passengers from assault. Defendant, on the other hand, while denying any negligence, contended that there was no assault and that plaintiff was seized with a fit of dizziness while ascending the staircase, and fell, striking his head. These conflicting issues were duly presented to the jury, together with the also conflicting testimony as to the nature of the care received by plaintiff after his injury. The jury, after an appropriate charge and apparent careful consideration of the issues, as shown

by their questions on return for further instruction, then brought in the defendant's verdict from which the appeal is taken. The only error relied upon, since the trial was otherwise altogether appropriate, was the action of the judge in admitting in evidence an entry by the ship's doctor in what seems generally referred to as the doctor's "log" or "journal." This entry, the doctor testified, was made in the regular course of his employment while plaintiff was in the ship's hospital. It is in Italian, but the interpretation as agreed upon is the following, appearing after the date, May 21, 1950, and the plaintiff's name: "At 6:15, while returning to the cabin on Deck C (after having been in the toilet on Deck B) was caught by sudden dizziness and fell on the stairway, striking his head on the steps." There followed statements describing the head wound or cut and referring to a "Fairly accentuated or fairly pronounced shock." Overruling the plaintiff's vigorous objections the court admitted these statements as entries in the regular course of business made admissible by the Business Entries Statute (28 U. S. C. sec. 1732).

Plaintiff now challenges this ruling on the basis of Palmer v. Hoffman (318 U. S., 109, 144 A. L. R., 719). We need not stop to consider whether that case has been limited by later precedents, since the situation here is quite different. There the statement in controversy was made by the engineer who was alleged to have caused the accident in issue and was made after the event for the purpose of ensuing litigation. Here, however, is a timely entry made by a doctor whose job it was to make such entries, and its admissibility is settled by numerous precedents. Among these we may cite Tucker v. Loew's Theatre & Realty Corporation (2 Cir., 149 F., 2d, 677, 680, citing earlier cases); Pekelis v. Transcontinental & Western Air, Inc. (2 Cir., 187 F., 2d, 122, 129-131, 23 A. L. R., 2d, 1349, certiorari denied Transcontinental & Western Air, Inc., v. Pekelis, 341 U. S., 951); Korte v. New York, New Haven & Hartford Railroad (2 Cir., 191 F., 2d, 86, certiorari de-

nied) New York, New Haven & Hartford Railroad v. Korte (342 U. S., 868), and Landon v. United States (2 Cir., 197 F., 2d, 128, 130). Plaintiff's claim that the entry was manufactured or doctored goes to weight and not admissibility, and was thoroughly aired at the trial.

In view of what appears thus to be its clear admissibility under the statute and the cases we do not need to consider other grounds urged by the defendant, such as that it was a ship's log admissible under the rule referred to in Lopoczyk v. Chester A. Poling, Inc. (2 Cir., 152 F., 2d, 457) and Naylor v. Isthmian SS. Co. (2 Cir., 187 F., 2d, 538), that it was merely cumulative of other adequate evidence, and that plaintiff waived his objection by agreeing to the interpretation as received in evidence.

Judgment affirmed.

COURT OF APPEALS

STATE OF NEW YORK

(309 N. Y. 283, 129 N. E. 2d 417)

DESSI WILLIAMS, appellant, v. MERVIN K. ALEXANDER, respondent.

Decided October 13, 1955.

Present: CONWAY, Ch. J.; DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 23, 1955, affirming a judgment in favor of defendant, entered in Kings County upon a verdict rendered at a Trial Term (BENJAMIN, J.).

BERNARD MEYERSON, ALBERT MARTIN COHEN and LOUIS I. ROTHENBERG for appellant.

JOHN D. KELLY and JOSEPH F. O'BRIEN for respondent.

FULD, J.—Dessi Williams was struck by defendant's automobile as he was crossing a street in Brooklyn with the

traffic light in his favor. His right leg fractured, he was taken to Kings County Hospital for treatment. At the trial the testimony of the parties as to the manner in which the accident occurred was sharply discrepant. According to plaintiff, defendant's automobile approached the intersection, at which he was crossing, without diminishing speed and ran into him. Defendant, on the other hand, insisting that he had brought his car to a complete stop at the light, maintained that another vehicle had struck it from the rear and propelled it forward and upon plaintiff.

In the early stages of the trial plaintiff introduced so much of the Kings County Hospital record as bore upon his injuries and their treatment. Counsel for defendant thereupon offered the balance of the record, and it was received in evidence over plaintiff's objection. Specifically challenged by plaintiff as inadmissible hearsay was an entry to the effect that he had stated to a physician at the hospital that "he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car (standstill) to run into him." Plaintiff denied making any such statement, and the doctor who recorded it was not called as a witness.

Upon this appeal—following a verdict in defendant's favor and an affirmance by a divided Appellate Division—we are called upon to decide whether the statement attributed to plaintiff, relating the manner in which the accident occurred, was properly admitted in evidence as a memorandum or record made "in the regular course of * * * business" (Civ. Prac. Act, sec. 374-a).* While there are many out-of-state decisions on the point, we have never had occasion to consider it; neither in Roberto v.

* Although the doctor who made the entry would have been competent to testify to plaintiff's alleged admission against interest, the entry itself was, nevertheless, excludable as hearsay unless within the compass of section 374-a of the Civil Practice Act (see, e.g., Green v. City of Cleveland, 150 Ohio St., 441, 444-445; Richardson on Evidence, 8th ed., 1955, sec. 233, p. 211); and the issue was sufficiently raised by the objection predicated on the hearsay rule.

Nielson (288 N. Y., 581), nor in Dougherty v. City of New York (295 N. Y., 786)—upon which reliance is placed to sustain the trial judge's ruling—nor in any other case was it necessary for this court to pass upon the question now posed.

Section 374-a of the Civil Practice Act permits the introduction in evidence of "Any writing or record * * * made as a memorandum or record of any act, transaction, occurrence or event," despite its hearsay character, "if the trial judge shall find it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." The term "business" is broadly defined as including "business, profession, occupation and calling of every kind," and among the records within the section's ambit are those that a hospital keeps in diagnosing and treating the ills of its patients (see Meiselman v. Crown Heights Hosp., 285 N. Y. 389; People v. Kohlmeyer, 284 N. Y. 366).

The statute, similar to those in effect in most jurisdictions, is designed to harmonize the rules of evidence with modern business practice, and give "evidential credit" to the memoranda or other writings upon which reliance is placed in the systematic conduct of business undertakings (see Johnson v. Lutz, 253 N. Y., 124, 127). It rests upon the probability of trustworthiness which inheres in such records by virtue of the fact, first, that they are the "routine reflections of the day to day operations of a business" (Palmer v. Hoffman, 318 U. S., 109, 114) and, second, that it is the entrant's own obligation, and to his interest, to have them truthful and accurate, made and kept as they are with the knowledge, indeed, for the purpose, that they will be relied upon in the conduct of the enterprise (see Johnson v. Lutz, supra, 253 N. Y., 124, 128; Weis v. Weis, 147 Ohio St., 416, 425; see, also, 5 Wigmore on Evidence, 3d ed., 1940, sec. 1522, p. 369; McCormick on Evidence, 1954,

sec. 281, pp. 596-597). It is this element of trustworthiness, serving in place of the safeguards ordinarily afforded by confrontation and cross-examination, which justifies admission of the writing or record without the necessity of calling all the persons who may have had a hand in preparing it. And it was to assure such accuracy and reliability that the Legislature made explicit the condition that the memorandum may be received in evidence—and this is the heart of the provision—only if it was "made in the regular course of [the] business, and * * * it was the regular course of such business to make such memorandum.

As the statute makes plain, and we do no more than paraphrase it, entries in a hospital record may not qualify for admission in evidence unless made in the regular course of the "business" of the hospital, and for the purpose of assisting it in carrying on that "business." The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments. Consequently, the only memoranda that may be regarded as within the section's compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise "helpful to an understanding of the medical or surgical aspects of * * * (the particular patient's) hospitalization" (e.g., Green v. City of Cleveland, 150 Ohio St., 441, 443-444; Commonwealth v. Harris, 351 Pa., 325, 330-331; see, also, Borucki v. MacKenzie Bros. Co., 125 Conn., 92, 102-103; McCormick, op. cit., sec. 290, p. 611).

It follows from this that a memorandum made in a hospital record of acts or occurrences leading to the patient's hospitalization—such as a narration of the accident causing the injury—not germane to diagnosis or treatment, is not admissible under section 374-a, and so it has been almost universally held under the identical or similar statutes of other jurisdictions. (see, e.g., Scott v. Gibbons Co., 192 Md., 319, 330; Sadjak v. Parker-Wolverine Co., 281 Mich., 84, 87-88; Valenti v. Mayer, 301 Mich., 551, 557; Green v. City of Cleveland, supra, 150 Ohio St., 441, 443-444; Weis

v. Weis, supra, 147 Ohio St., 416, 425; Commonwealth v. Harris, supra, 351 Pa., 325, 330-331; see, also, Borucki v. MacKenzie Bros. Co., supra, 125 Conn., 92, 102-103; Watts v. Delaware Coach Co., 44 Del., 283; Brown v. St. Paul City R'y, 241 Minn., —, 62 N. W., 2d, 688, 695-696; Richardson on Evidence, 8th ed., 1955, sec. 233, pp. 209-210, 211-212; McCormick, op. cit., sec. 290, p. 611; Medina, Current Developments in Pleading, Practice and Procedure in the New York Courts, 30 Corn. L. Q., 449, 454-458). In the words of the Ohio court in Green v. City of Cleveland (supra, 150 Ohio St., 441, 444), typical of those found in the other cases, "it was the business of the hospital to diagnose plaintiff's condition and to treat her for her ailments, not to record a statement describing the cause of the accident in which plaintiff's injuries were sustained."

In some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by *an* automobile (see Scott v. Gibbons Co., supra, 192 Md., 319, 330; cf. Roberto v. Nielson, supra, 288 N. Y., 581; Watts v. Delaware Coach Co., supra, 44 Del., 283). However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment. That being so, entries of this sort, purporting to give particulars of the accident, which serve no medical purpose, may not be regarded as having been made in the regular course of the hospital's business (see Scott v. Gibbons Co., supra, 192 Md., 319, 330). Indeed, in discussing the matter, Wigmore observed that the essential "Guarantee of Trustworthiness" rests upon the fact that "the physicians and nurses * * * themselves rely upon the record," and that the record is designed to be "relied upon in affairs of life and death" (6 Wigmore, op. cit., sec. 1707, p. 36;

see Loper v. Morrison, 23 Cal., 2d 600, 608). Such reasoning, however, will not support the use, or justify the receipt of a statement detailing the circumstances of the accident where they are immaterial to, and were never intended to be relied upon in, the treatment of the patient. There is no need in that case for the physician to exercise care in obtaining and recording the information or to question the version, whatever it might be, that is given to him. The particulars may be a natural subject of the doctor's curiosity, but neither the inquiry nor the response properly belong in a record designed to reflect the regular course of the hospital's business (see, e.g., Commonwealth v. Harris, supra, 351 Pa., 325, 331).

In conclusion, then, that portion of the hospital record containing the statement assertedly made by plaintiff as to the manner in which the accident happened was erroneously admitted, and since we cannot say that it did not influence the jury in arriving at its verdict for defendant there must be a new trial.

The judgment of the Appellate Division and that of Trial Term should be reversed and a new trial granted, with costs to abide the event.

Desmond, J. (dissenting)—I see no error here and no reason for retrying this simple question of fact.

Plaintiff, for his own convenience, chose to prove his injuries and the hospital treatment he received therefor by putting a hospital record in evidence and without calling as a witness the physician who made the entries. In so doing he, of course, vouched for the accuracy and regularity of that record. Defendant made no objection, but in his turn offered in evidence so much of the same hospital record as showed a statement to the hospital physician by plaintiff that the accident had occurred in a manner quite

different from that testified to at the trial by plaintiff. Plaintiff objected to any such "history" going into evidence. His alleged ground of objection was stated in the one word: "hearsay." That, of course, was meaningless in this context. An undoubted exception to the "hearsay" rule makes admissible extrajudicial declarations against interest (Reed v. McCord, 160 N. Y., 330, 341). Plaintiff's declaration to the hospital physician as to the way the accident happened was directly probative evidence of a main fact in issue (Gangi v. Fradus, 227 N. Y. 452). It is, of course, conceivable (but unlikely) that by plaintiff's use of the word "hearsay" he referred to the failure of defendant to call as a witness the physician who had written up the notes. But plaintiff himself had put into evidence the (helpful to him) parts of that identical paper without calling the physician. Surely plaintiff could not then demand that the other party prove the authenticity of the very record plaintiff had himself presented to the court. Since plaintiff had been allowed to prove by the record alone the diagnosis and treatment of his injuries it would be absurd to forbid defendant using the same record, written in the same handwriting by the same physician at the same time, to prove an equally relevant, competent and material fact, that is, that plaintiff had stated to the physician that his injuries were caused in the manner asserted by defendant.

It follows from the above that section 374-a of the Civil Practice Act, our statutory rule as to admissibility of records made in the regular course of a business, has little or nothing to do with this case. What we have here is an admission against interest, proved not by the oral testimony of the person to whom it was made, but by an authentic document already vouched for to the court by the opposing party himself.

But let us suppose that this is a section 374-a case. "Hospital records concededly are included within the records to which section 374-a of the Civil Practice Act is appli-

cable" (People v. Kohlmeyer, 284 N. Y., 366, 369, 370). The physician who made the entries need not be called as a witness (Meiselman v. Crown Heights Hospital, 285 N. Y., 389, 396, 397). True, as Judge Fuld points out, this court has not yet directly decided whether the section 374-a makes admissible that part of a hospital record which gives the history of the injury. But why should this court not adopt a practical and useful construction, rather than a narrow and unnecessarily restrictive one? And the statute itself seems to furnish the answer: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial court shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." There is no reason why the "history" part of a hospital record, obtained not from unidentified persons but from the patient himself, should not be used in evidence against the patient. Of course, the writing must have been made in the regular course of the hospital's business and it must have been the regular course of the business of the hospital to make such entries. But in this case plaintiff did not object because of any failure to prove those requirements (see Meiselman v. Crown Heights Hospital, 285 N. Y., 389, 397, supra). Indeed, he could not, after himself bringing the record to court, reasonably urge that it was not the regularly made record of this hospital. And he knew, as we all do, that an examining physican, especially in a hospital receiving department, always inquires as to the cause of a trauma. Certainly, in the absence of any suspicious circumstance, it is not up to the courts to decide just how thoroughly a qualified physician may delve into the cause or occasion of the injuries he is diagnosing and treating. Anyhow, all this is by the statute's own words committed

to the trial judge's discretion. It is he who is charged with passing on the question of whether the entry was regularly made. Here, no one suggested that it was not so made or called for proof that it was. The trial justice, therefore, had no reason for excluding it, particularly since there was no suggestion that the physician or the hospital had any interest in the case or any possible reason for falsifying these records.

This was a routine trial of a simple issue of fact. Plaintiff said the accident happened one way, defendant said that it happened another way. A hospital book brought to court by plaintiff showed that he himself had described the occurrence in the way that defendant described it. Plaintiff denied that he had made such a statement at the hospital. The jury settled that dispute. It is most unfortunate, especially in these days of congested calendars, that such a case must now be retried.

The judgment should be affirmed with costs.

Conway, Ch. J.; Froessel and Van Voorhis, JJ., concur with Fuld, J.; Desmond J., dissents in an opinion in which Dye and Burke, JJ., concur.

FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 646.

ANDREW TERRASI,

Petitioner,

v.

SOUTH ATLANTIC LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The petition for certiorari is primarily based on the assertion, unfounded in fact, that the trial court allowed into evidence as part of a medical record (Exhibit G) under the federal Business Entries Statute (28 U. S. C. sec. 1732), the history given to the doctor by plaintiff of his accident not *germane to diagnosis or treatment.* Even assuming there is adequate conflict in the decisions as to whether this type of evidence is admissible under the statute, which is denied (Point II p. 11, *infra*), the question obviously is not involved in this case because the history given by plaintiff was (Petitioner's brief, p. 4):

> "At 6.15, while returning to the cabin on Deck C (after having been in the toilet on Deck B) was caught by sudden dizziness and fell on the stairway, striking his head on steps.
>
> "Lacerated, contused wound, or cut, six centimeters at the occipital region, deep to the bone. Fairly accentuated or fairly pronounced shock."

It is beyond understanding how plaintiff can cavalierly urge to this Court that a history of *dizziness* given to a doctor is not germane to treatment or diagnosis. Indeed, no such argument was made to the trial court nor to the Court of Appeals. Significantly, in plaintiff's petition to this Court, other than to assert the bare conclusion not even made to the courts below, there is no attempt to show nor is it apparent how a patient's disclosure to a treating doctor that he fell because of a *dizzy spell* could possibly be separated from the doctor's decision on the extent of sedation, bed rest, and other treatment to be afforded the patient.

Moreover, on the particular facts in the case at bar, the admission of Exhibit G is sustainable on several grounds independent of the federal Business Entries Statute, and thus the question posed by plaintiff (even assuming what obviously is not so, that a history of dizziness is unrelated to treatment or diagnosis) would in no event be dispositive of the appeal. Plaintiff's representation to this Court that there is "no other evidence in the record to support" (Petitioner's brief, pp. 9 & 5) the history of dizziness in Exhibit G is an outright misstatement. The plain fact is that oral testimony by deposition, which was unobjected to by plaintiff, had in the first instance been given to the jury by Dr. Valenzi on the history of dizziness he obtained from plaintiff, and, therefore, Exhibit G which was subsequently received in evidence and which

also contained this history was merely cumulative evidence (Point III(c) p. 15, *infra*). Indeed, Exhibit G was ultimately read into evidence and to the jury *with plaintiff's consent* and therefore the document became admissible no matter what it contained (Point III(b) p. 14, *infra*), and in any event was admissible in evidence under non-statutory principles of evidence irrespective of the federal Business Entries Statute (Point III(a) p. 13, *infra*).

Clearly, therefore, the case at bar does not involve the question the petition raises.

The Court of Appeals for the Second Circuit, in affirming the decision of the trial court, recognized, without passing upon, the existence of these independent grounds to sustain the admissibility of Exhibit G, saying (226 F.(2) at pp. 825-826):

> "In view of what appears thus to be its clear admissibility under the statute and the cases we do not need to consider other grounds urged by the defendant, such as that it was a ship's log admissible under the rule referred to in *Lopoczyk* v. *Chester A. Poling, Inc.*, 2 Cir., 152 F. 2d 457, and *Naylor* v. *Isthmian S. S. Co.*, 2 Cir., 187 F. 2d 538, that it was merely cumulative of other adequate evidence, and that plaintiff waived his objection by agreeing to the interpretation as received in evidence."

Counter-Statement of Facts.

Plaintiff, before Hon. William Bondy and a jury, unsuccessfully sought to recover damages for an alleged assault claimed to have been committed on May 21, 1952 by an unknown person while he was a passenger aboard the SS. *Italia* owned and operated by defendant, as well as further damages for humiliation and aggravation because allegedly after his injury he was orally abused by

the hospital attendant. After a four day trial, the jury on January 20, 1955 returned a verdict in favor of defendant on both counts.

At the trial plaintiff testified that he boarded the SS. *Italia* as a third class passenger on May 19, 1950 (R. 20, 21). Up until May 21, 1950 everything proceeded normally (R. 88, R. 89) and there was no occasion for him to complain to any of the ship's personnel concerning anything unusual about the ship (R. 89-90). According to plaintiff, at about 4 or 4:30 a. m. of May 21, 1950 (R. 21) he left his cabin on the after end (R. 37) of "C" deck (R. 25) dressed in his bathrobe (R. 22) to go to the toilet on "B" deck (R. 22, R. 38). As he walked to the stairway he did not see anyone in the vicinity (R. 32, R. 91). When he reached the stairway he grasped the railing, placed his foot on the first step and started going up the stairway (R. 27, R. 91-92). Plaintiff testified he suddenly had a fear that someone was behind him and before he could turn around he felt a blow on his head (R. 22, R. 27), and the next thing he knew he awakened on the deck near the stairway (R. 27-28). Plaintiff's doctor at the trial conceded plaintiff did not suffer from any residue of the injury other than what is referred to as general nervousness (R. 240), that plaintiff had never been found unfit for duty by him (R. 237-238) and that his findings were "perfectly normal" (R. 231). Plaintiff by his own testimony would have had the court and jury believe that it took him several months after he returned to the United States in August, 1950 before he was able to resume employment (R. 66) and that he no longer is able to work (R. 112); but on cross-examination plaintiff suddenly remembered that he returned to the United States on August 1, 1950 and that he resumed his employment that very same day (R. 105) and that since then he has been

working almost continuously earning about the same amount of money which he earned before the accident, as his earning record clearly indicates (R. 137-149, Def. Ex. B-D).

Plaintiff, who admitted there was no motive for anyone to have assaulted him (R. 90, R. 93, R. 95), did not see his alleged assailant (R. 90-91) or where the alleged blow came from (R. 91) and he could give no direct testimony that he was actually assaulted (R. 91) and no witness called established the alleged assault (R. 132). It was uncontroverted that the wound on plaintiff's neck was lengthwise (R. 208, R. 265, R. 276) and not vertical, so that it could have been caused only by coming in contact with a horizontal object and not from an overhead blow (R. 240, R. 265). Indeed, plaintiff's doctor agreed that the type of injury inflicted could not have come from a blackjack or other similar instrument (R. 240). Moreover, since plaintiff based his claim on an unprovoked assault, he had to admit that thereafter he was in constant fear of his own safety and his family's safety (R. 99, R. 101); but curiously enough he did not report the alleged assault to any of the ship's personnel or any of the passengers (R. 97, R. 100, R. 101), he did not request any protection (R. 100), he continued to roam about the vessel unlimitedly (R. 99-100) and when he returned to the United States, although he could have selected another vessel, he sailed on the SS. *Italia* (R. 103-104) the very ship on which lurked the claimed dangers of which plaintiff supposedly was in dreaded fear.

Cabin boy Bettoso, who at the time of the accident was mopping the deck about five or six meters aft of the stairway in question (R. 290, R. 291), testified that he actually heard plaintiff slipping down the stairways (R. 291, R. 292-293, R. 299-301), as would have happened during plaintiff's dizzy spell, and that by the time Bettoso turned to learn what happened he saw plaintiff going back to and re-enter-

ing his cabin (R. 293). Bettoso further testified that there had been no other person in the vicinity (R. 302) and that when he later that morning washed the stairway (R. 294) he noticed blood on two or three of the steps in about the middle of the stairway (R. 295), which could not have been there had plaintiff been assaulted while on the deck and not on the stairway as plaintiff claimed.

In addition, Dr. Valenzi, ship's surgeon who treated plaintiff (R. 150, R. 151, R. 172) testified orally, and not from any documents, that in obtaining plaintiff's history plaintiff did not say he was assaulted but to the contrary plaintiff stated he had suffered a dizzy spell while ascending the stairway and that he slipped down the stairway and struck his head against the steps (R. 161, R. 288). This oral testimony was competent, relevant, and material, and at no time was it objected to by plaintiff's attorney (R. 161, R. 288). Judge Bondy also admitted into evidence Exhibit G, a page from the ship's surgery log (R. 152) wherein was recorded in the regular course of the doctor's duties (R. 152-154) the history given by plaintiff that he suffered a dizzy spell, and the treatment rendered.[1]

This exhibit is in a foreign language and while plaintiff's attorney objected to its competency before it was translated to the jury and before the jury knew what it contained (R. 340), when the time came to read it to the jury

[1] Though we believe it relevant to the issues presented, we point out that the entry in Exhibit G by Dr. Valenzi was not made by an alleged tort-feasor as is claimed in the petition; apparently plaintiff forgot that the complaint upon which his claim is grounded served in October, 1950 soon after the accident does not make any allegation against the ship's doctor but it is there stated that the ship's *hospital attendant*, not the ship's doctor, orally abused plaintiff. In this respect, Judge Bondy believed this sudden inconsistency in plaintiff's claim was of sufficient importance to direct in his charge the jury's attention to the allegation in the complaint which proceeded against the hospital attendant and not the ship's surgeon (R. 369).

plaintiff's attorney reversed his position and explicitly *consented* that it be translated and read to the jury (R. 388) and that the jury be furnished with a transcript of the translation (R. 389).

POINT I.

THE DECISION BELOW SUSTAINING THE ADMISSIBILITY OF EXHIBIT G AS A RECORD MADE IN THE REGULAR COURSE OF BUSINESS UNDER THE FEDERAL BUSINESS ENTRIES STATUTE 28 U. S. C. §1732, IS CLEARLY CORRECT AND IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *Palmer* v. *Hoffman*, 318 U. S. 109.

The petition does not challenge the now firmly established principle that records made by physicians treating (as distinguished from examining) a plaintiff, as well as records kept by hospitals, if made in the regular course of business, are admissible in evidence. *Korte* v. *N. Y. N. H. & H. R. Co.*, 191 F. 2d 86 (2 Cir.) certiorari denied 342 U. S. 868; *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122, 129-131 (2 Cir.) certiorari denied 341 U. S. 951; *Tucker* v. *Loew's Theatre*, 149 F. 2d. 677, 680 (2 Cir.); *Landon* v. *U. S.*, 197 F. 2d 128, 130 (2 Cir.); *Croll* v. *John Hancock Mut. Life Ins. Co.*, 198 F. 2d 562 (3 Cir.); *Ulm* v. *Moore-McCormack*, 115 F. 2d. 492, rehearing denied 117 F. 2d 222 (2 Cir.) certiorari denied 313 U. S. 567. Nor does the petition question the irrelevancy of plaintiff's being in a ship's hospital rather than in a shore hospital in determining whether the entry made during his hospitalization is admissible.

Petitioner claims that because *at the trial*[2] the ship's doctor was accused by plaintiff, not of having caused the accident, but of having ill-treated plaintiff, the entry should be considered made by an active tort-feasor and inadmissible as a matter of law under the decision of *Palmer* v. *Hoffman,* 318 U. S. 109.

The *Palmer* decision, however, is clearly inapplicable. A reading of the Court of Appeal's opinion discloses that in that case there was nothing more involved than a statement in question and answer form taken from the engineer driving the engine which caused the accident and which gave his own version of how the accident occurred; the statement was taken in the course of defendant's subsequent investigation of the accident. Obviously such a statement was inadmissible. Those circumstances are not present here.

In the case at bar we have a timely entry germane to diagnosis and treatment, made by a physician who treated the plaintiff in the ship's hospital and the entry is in the ship's surgery log. The physician testified that the entry was made in the regular course of business. Dr. Valenzi

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[2] Under the statute, even if the entry had been made by an alleged active tort-feasor as is claimed in the petition, that would go to the weight of the entry and not to its admissibility. *Landon* v. *U. S.*, 197 F. 2d 128 (2 Cir.). But actually, plaintiff's pleadings did not charge Dr. Valenzi with any wrongdoing, for it is there alleged the *hospital attendant* abused plaintiff. See footnote 1, *supra,* page 6. This was not the result of confusion since plaintiff knew who the doctor was and who the hospital attendants were (R. 33-34). Moreover, plaintiff's charges were absolutely baseless, as is amply demonstrated by plaintiff's testimony that after he was allegedly abused in the hospital and after he returned to stay in his cabin, he voluntarily left his cabin and he requested to and was allowed to sleep in the hospital (R. 36-37), and by plaintiff's testimony that on his return trip he could have selected another ship but instead he returned on the same ship (R. 103) and that he had no hesitancy to return to the hospital and obtain pills from the doctor (R. 104). No doubt this evidence was considered by the jury and influenced it in arriving at the verdict it did.

first established that Exhibit G came from the surgery log, testifying as follows (R. 152):

> "Q. Did you have any conversation with him (plaintiff)? A. Yes. * * *
>
> "Q. When Mr. Terrasi made the statement to you that you entered in your report, did you write it down in a book? * * * A. In my log.
>
> "Q. Is that the medical log? A. Surgery; yes."

Continuing, Dr. Valenzi established the entry was made within a reasonable time after the event, either while plaintiff was still in the room "or in the hospital already" (R. 153):

> "Q. Which one did you make first (the entry in the surgery book or the written report to the captain)? A. In the surgery book; this is my everyday work.
>
> "Q. At the time you made the entry in the surgery book, was Mr. Terrasi still in the room? A. Yes, or in the hospital already.
>
> "Q. Well you wrote down what he told you? A. Yes."

The doctor then established that this entry was made in the regular course of business (R. 154):

> "Q. Now, Doctor, you keep a book during the regular course of your practice of medicine, during your regular course of business here on the ship? A. Yes.
>
> "Q. Which book is that? A. The surgery book.
>
> "Q. Is this where you make all entries pertaining to treatments? A. All things that happen; all kind of things; everybody that comes inside is entered in this book.
>
> "Q. And this book is kept in your regular course of business? A. Yes, the name of the patient, the number of the cabin, his treatment.

"Q. There is not any other place where you make an entry outside of this book? A. No.

"Q. You keep this book yourself, personally? Nobody else makes any entries here? A. No. I am responsible here. When I have a colleague, my colleague does the same thing."

There is no justification for the suggestion in the petition that Dr. Valenzi first testified that he did not keep any records, but after changing his mind injected the surgery log entry into the case (Petition, p. 7). Plaintiff's attorney well recognizes that the portion of Dr. Valenzi's testimony dealing with the absence of records relates to records other than those kept in the surgery log, for plaintiff's attorney himself brought out to the jury the following (R. 282):

"Q. And you kept no other records, either of your treatment of this man, Terrasi, other than what you claim you entered in your log journal or your medical journals——

The Exhibit B for identification (now Exhibit G in evidence).

"A. Exactly."

The unfounded argument contained in the petition that the entry in the surgery log is a "manufactured piece of evidence", is nothing more than a repetition of the identical inflammatory and emotional appeal which plaintiff's attorney presented to the jury and which the jury necessarily rejected by finding against the plaintiff (R. 343-4, 347-353).

The federal statute dealing with the admissibility of entries made in the regular course of business, Section 1732, 28 U. S. C. categorically provides that all questions affecting the weight of the document are to be resolved as ques-

tions of fact and shall not affect the admissibility of the document. Not only is there no merit to plaintiff's unjustified attack on the authenticity of the document, but assuming that an issue of fact existed, the jury has already resolved that question against the plaintiff.

POINT II.

THERE IS NO CONFLICT BETWEEN THE DECISION AT BAR CONSTRUING THE FEDERAL BUSINESS ENTRIES STATUTE AND DECISIONS OF STATE COURTS CONSTRUING SIMILAR STATE STATUTES INASMUCH AS A HISTORY OF DIZZINESS GIVEN BY A PATIENT TO A DOCTOR IS OBVIOUSLY GERMANE TO DIAGNOSIS OR TREATMENT.

The petition asserts that the alleged conflict between the Court of Appeals for the Second Circuit and the New York State Court of Appeals, as well as those other jurisdictions cited by the New York State Court of Appeals in *Williams* v. *Alexander*, 309 N. Y. 283, should be resolved by this Court so that all of the Federal Courts and the courts of those states having Business Records Acts similar to the federal Business Entries Statute will have uniformity in applying the law under such Acts (Petition pp. 5-6 & 11). But the petition does not aver that there is any conflict in the federal decisions interpreting the federal Business Entries Statute.

Because state courts have interpreted similar state procedural statutes differently presents no federal question and quite obviously does not give rise to a conflict in decisions involving interpretation of the particular federal statute with which this case is concerned. On this ground alone certiorari should be denied.

But in any event, the decision in the case at bar is not at all in conflict with state court decisions interpreting

their own local similar statutes and therefore the question which petitioner would have this Court review is clearly not presented in this case.

The petition relies solely on the four to three decision of *Williams* v. *Alexander*, 309 N. Y. 283 and the cases from other state courts which it cites. But the *Williams* case holds only that a detailed narrative history of an accident so far as it is not germane to treatment or diagnosis is inadmissible, as distinguished from those portions of the history which may in any way be helpful to an understanding of the medical aspects of the patient's case, which are admissible. The *Williams* case explicitly states (309 N. Y. at page 288):

> "In some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by an automobile (see Scott *v.* Gibbons Co., *supra*, 192 Md., 319, 330; cf. Roberto *v.* Nielson, *supra*, 288 N. Y., 581; Watts *v.* Delaware Coach Co., *supra*, 44 Del., 283). However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment."

We respectfully submit that in the instant case the patient's explanation as to how he was hurt, viz: he suffered a dizzy spell, cannot be said other than to be helpful to an understanding of the medical aspects of the case because knowledge of a dizzy spell clearly bears on a doctor's decision as to the extent of sedatives, bed rest, and other treatment to prescribe, as well as on the ultimate diagnosis.

POINT III.

IN ANY EVENT THE QUESTION SOUGHT TO BE RAISED BY THE PETITION WOULD NOT BE DISPOSITIVE OF THE APPEAL SINCE EXHIBIT G WAS ADMISSIBLE NOT ONLY UNDER NON-STATUTORY PRINCIPLES OF EVIDENCE AS AN ENTRY IN A SHIP'S LOG, BUT ALSO BECAUSE PLAINTIFF SPECIFICALLY CONSENTED TO ITS BEING READ INTO EVIDENCE. MOREOVER, THE HISTORY OF DIZZINESS HAD ALREADY BEEN TESTIFIED TO ORALLY BY THE DOCTOR INVOLVED WITHOUT OBJECTION FROM PLAINTIFF SO THAT THE CONTENTS OF EXHIBIT G WAS MERELY CUMULATIVE EVIDENCE.

a. Exhibit G was admissible as an entry in a ship's log.

As an entry in the ship's surgery log (R. 152), the entry was properly received in evidence inasmuch as there is abundant authority holding that entries in ship's logs are admissible whether offered by the plaintiff or by the defendant, and whether offered in an admiralty suit or in a civil suit.

Thus, in *Lopoczyk* v. *Poling*, 152 F. 2d 457 (2 Cir.) the court (in holding admissible the following log entry: "Note. At 11:40 A. M., the u. bolt welded to the mast holding the boom, let go, in the weld, the boom fell down striking Capt. W. Lopoczyk with the result that he was taken by ambulance to Greenpoint hosp. in a critical condition."), stated at pages 459-460:

> "Since the ship's log is clearly admissible in admiralty, Warner Barnes & Co. *v.* Kokosai Kisen Kabushiki Kaisha, 2 Cir., 102 F. 2d 450, modified 2 Cir., 103 F. 2d 430; The Georgian, 5 Cir., 76 F. 2d 550; The Earnest H. Meyer, 9 Cir., 84 F. 2d 496, certiorari denied Hammond Lumber Co. *v.* Broughton

> & Wiggins Nav. Co., 299 U. S. 600, 57 S. Ct. 193, 81 L. Ed. 442, it should likewise be admissible under the Jones Act. We can see no reason for adoption of a hypertechnical distinction in the rules of evidence which would lead to anomalous results, particularly in cases involving major principles of proof."

In *Naylor* v. *Isthmian Steamship Company,* 187 F. 2d 538 (2 Cir.), the lower court refused to admit a log entry offered by the defendant, who prepared the log entry. The Court of Appeals reversed, declaring at page 540:

> "The smooth log was admissible both under the Business Entry Statute, 28 U. S. C. A. §1732, and under general admiralty practice which is applicable to the admissibility of evidence in actions under the Jones Act. Lopoczyk *v.* Chester A. Poling, Inc., 2 Cir., 152 F. 2d 457."

b. *Exhibit G was admissible since it was read into evidence and to the jury with the explicit consent of plaintiff.*

Exhibit G as admitted was in a foreign language and until translated obviously it meant absolutely nothing to the jury. While an interpreter had for the guidance of the court translated Exhibit G (R. 197-199), this had all taken place in the absence of the jury (R. 199). Naturally, after the jury retired and it glanced at Exhibit G written in a foreign language it would, as it did, ask for a translation of it (R. 338). At this point plaintiff's attorney instead of preserving the objection he had previously taken to Exhibit G, reversed his position and explicitly *consented* not only to the interpreter's translation of the exhibit being read to the jury (R. 388), but also to the jury's being furnished with a transcript of the translation marked Def. Ex. J. id. (R. 389).

While it has held that an objection to evidence once made need not be repeated through the trial to preserve the rights of the appellant (*Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2 Cir.) cert. denied 343 U. S. 966; *Couto* v. *United Fruit Co.*, 203 F. 2d 456 (2 Cir.)), those cases are obviously inapplicable where a party, as here, instead of failing to take an objection, explicitly consents to the evidence being furnished to the jury.

c. *Oral testimony unobjected to by plaintiff had already been given the jury by Dr. Valenzi of the history of dizziness so that Exhibit G which also contained this history was merely cumulative of other adequate evidence.*

Before Exhibit G was admitted into evidence, Dr. Valenzi gave the following testimony which the record clearly shows was oral testimony and not from any documents (R. 161):

> "Q. Did any conversation between you and he take place? A. Nothing besides the circumstances that accompanied the wound.
>
> "Q. Did you ask him what happened to him? A. Of course I did.
>
> "Q. What was his answer? Will you tell me his words? A. Exactly I couldn't tell you his words but what he said was this: that going down from the deck where the toilets are to deck C where his cabin was he felt dizzy and he fell down and struck his head against the staircase (indicating).
>
> The Court: That is well done. That is all right. He doesn't object to it.
>
> Mr. Graham: That is my own cross examination. I am cross examining him on what he was reading from a paper before.
>
> The Court: The questions are all right. You asked the questions yourself, so don't find fault.

Mr. Graham: *I am not finding fault with it.*" (Emphasis supplied.)

Dr. Valenzi had also testified (R. 288):

"Q. Did Mr. Terrasi tell you whereabouts on the ship he was hurt? A. He told me from deck B down to deck C, he fell on the staircase."

All of the above testimony was received without objection by plaintiff's counsel (R. 161, R. 288, R. 97).

Since Exhibit G contained nothing more than what already had been testified to without plaintiff's objection, it was merely cumulative evidence and, therefore, even if it were error to admit the exhibit, the error did not prejudice plaintiff. *Tucker* v. *Loew's Theatre & Realty Corp.*, 149 F. 2d 677, 680 (2 Cir.).

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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